



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CRIMINAL DIVISION**

**CONFIRMATION CASE NO. 545 OF 2022**

**(Being Criminal Case No. 503 of 2022 before the First Grade Magistrate Court sitting at Chiradzulu)**

**THE REPUBLIC**

**V**

**CHIFUNDO JULIO**

**Coram: Justice Vikochi Chima**

**Ms Bridget Kumwenda, Senior State Advocate**

**Ms Sigele Chirwa and Ms Doreen Kawisa, Senior Legal Aid Advocates**

**Mrs Moyo, Court Clerk**

**ORDER IN CONFIRMATION**

**Chima J**

1. Chifundo Julio was convicted of breaking into a building and committing a felony therein contrary to section 311 of the Penal Code and was sentenced to 20 months imprisonment with hard labour. The accused had been charged with burglary contrary to section 309 of the Penal Code and also with theft contrary to section 278 of the Penal Code. It had been alleged and was proved that he had on the night of 27 February 2022 broken and entered the room at Tiyese rest house and stole therefrom a phone valued at K75, 000 and cash in the amount of K12, 000. The magistrate held that the rest house was neither a dwelling house nor a human dwelling and thus convicted the accused of breaking into a building and committing a felony therein as opposed to the offence he had been charged with of burglary. The reviewing judge set the matter down to consider the question whether a rest house is a human dwelling and in the result, the propriety of convicting the accused of breaking into a building as opposed to the burglary.

2. In *Mussa v R*,<sup>1</sup> the appellant was charged in the first and second counts with burglary and theft from the European Rest House at Mzimba and in the third and fourth counts with burglary and theft from the dwelling-house of a Mr Woodlands. The theft charges in the second and fourth counts were laid under section 282 (b) of the Penal Code as “theft from a dwelling house” (as opposed to simple theft under section 278 of the Penal Code) an offence which is now punishable with ten years’ imprisonment (then punishable with fourteen years’ imprisonment). Spenser-Wilkinson, C.J. held that the learned magistrate had rightly convicted the appellant on the two burglaries of the rest house as well as the dwelling-house as both of these were buildings used as human dwellings. He, however, disallowed the conviction of the second count of theft from a dwelling-house under section 282 (b) of the Penal Code stating that a rest house is not a dwelling-house. He said:

I doubt whether the rest house from which the goods were stolen was a “dwelling house” within the meaning of that expression in the Penal Code... The learned magistrate quite properly decided that the rest house was “a building used as a human dwelling” within the meaning of sections 307 and 308 [now sections 309 and 310] and concluded from this, as I understand his judgment, that it was also a dwelling house. The two expressions, however, are not the same and a building may well be one which is used as a human dwelling without coming within the term “dwelling house”. This expression is not actually defined in our Code though by section 3 the expression is given an extended meaning. It is an expression which has been interpreted in many cases in England so that for its primary meaning one must look to English law where it seems always to have been interpreted as having something of the element of a home.

As for the reason above given, I have found it necessary to reduce the sentence in respect of the second count. I do not think it necessary to ascertain the correct meaning of the expression or to reach a decision as to whether this rest house is a dwelling house; it is sufficient for me to say that I have doubts as to whether it is and that these doubts were shared by the Acting Solicitor-General who appeared for the Crown. I was of the opinion, therefore, that the conviction on count 2 should be altered to one of simple theft under section 278 of the Penal Code and I altered the conviction accordingly.’

3. From the *Mussa* case, it can clearly be seen that a building can be a human dwelling without it being a dwelling house. As such, a human dwelling is of wider application and that a dwelling house is just one example of a human dwelling. Further, a rest house is in fact a human dwelling. Thus it was not correct for the magistrate to convict the accused of the offence of breaking into building and committing a felony therein. I thus convict the accused of the burglary and the theft that he had been originally charged with and of which he was being tried up to the end of the trial.
4. The accused and the complainant are friends and the two had been drinking beer together at a drinking joint on the day from around 5 p.m. After some time and having got drunk, the complainant went to sleep in a room at Tiyese rest house. The accused came and broke the door to the room and stole the stated items. The complainant was able to see the accused get into the room and take the items but being drunk, he was unable to protest. There was no recovery of the stolen items. There appears to have been no real damage to the door of the room that he broke. The convict is a mature person at the age of 32 years. In mitigation, the convict apologised to the court for what he did in transgressing the law and promised

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<sup>1</sup> [1923-60] 1 ALR Mal 693

never to offend again. Having considered the circumstances of the matter, I am the opinion that the twenty months' imprisonment with hard labour is still the appropriate punishment for the burglary. I further impose a twelve month sentence imprisonment with hard labour for the theft. The sentences are to run concurrently with effect from the date of arrest.

**Made this day, the 5<sup>th</sup> of May 2023**

  
Chima J

